NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 09 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ABRAHAM G. DIAZ, III, aka Abraham G. Diaz, II, Defendant - Appellant.	No. 06-30324 D.C. No. CR-05-06055-EFS MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of Washington
Edward F. Shea, District Judge, Presiding

Submitted February 6, 2007[**]
Seattle, Washington

Before: FISHER and TALLMAN, Circuit Judges and MILLS, District Judge.[***]

Defendant-Appellant Abraham Diaz appeals the district court's denial of his motion to suppress. Diaz argues that the evidence discovered in the search of his

[*]This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**]This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***]The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

car should have been suppressed as the fruit of an illegal search; that *New York v. Belton*, 453 U.S. 454 (1981), should be abrogated; and that the district court should have dismissed the indictment because Diaz did not have a prior conviction for a crime punishable by more than one year. We affirm.

Officer Thatsana had reasonable suspicion to believe that Diaz might be armed and dangerous given Diaz's refusal to provide information relating to his identity in an apparent effort to conceal his involvement in possibly dangerous criminal activities. *See Terry v. Ohio*, 392 U.S. 1, 28 (1968); *United States v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976). Under the totality of the circumstances, an officer in Thatsana's position who did not pat down Diaz for weapons could be taking substantial and unnecessary risks. *See United States v. Mattarolo*, 209 F.3d 1153, 1158 (9th Cir. 2000).

We reject Diaz's argument that *New York v. Belton*, 43 U.S. 454 (1981), should be abrogated. As we recently held, *Belton* remains good law and its holding authorizing a search of a vehicle based solely on the custodial arrest of an occupant may only be modified by the Supreme Court. *See United States v. Osife*, 398 F.3d 1143, 1147 (9th Cir. 2005).

We also reject Diaz's argument that the district court should have dismissed the indictment because he did not have a prior conviction for a crime punishable by

more than one year, as required by 18 U.S.C. § 922(g)(1). *Blakely v. Washington*, 542 U.S. 296 (2004), did not change the definition of what constitutes a maximum sentence under state law for purposes of prosecution under § 922(g)(1). *See United States v. Murillo*, 422 F.3d 1152, 1154 (9th Cir. 2005). Accordingly, the maximum sentence remains the statutory maximum, not the maximum sentence available in the particular case under the sentencing guidelines. *Id.*

AFFIRMED.